No. 82-973

In the Supreme Court of the United States

OCTOBER TERM, 1983

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

PREDRAG STEVIC

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Respondent and amici have attempted to obscure the issue before this Court by discussing a host of tangential matters and by mischaracterizing the government's approach to withholding of deportation relief. Our position on the question presented, simply stated, is the following: The United States' accession to the United Nations Protocol in 1968 was based on the explicit understanding that such action would not alter or enlarge the substance of this Nation's immigration laws. Congress, in enacting the provisions of the Refugee Act of 1980 involved in this case, intended only to incorporate the formal terms of the Protocol into the Immigration and Nationality Act (the Act), 8 U.S.C. 1101 *et seq.* Accordingly, the Refugee Act did not alter the pre-existing

standard by which an alien is required to prove eligibility for withholding of deportation. Neither respondent nor any of the amici has presented a shred of evidence that casts doubt on the validity of this syllogism. They mention the legislative history of the Refugee Act only in passing, and they offer no explanation for the unambiguous statements in the House and Senate Reports quoted in our opening brief (at 37-40).

1. Indeed, the thrust of respondent's argument before this Court is not that the Refugee Act of 1980 changed the standard an alien must meet in order to be eligible for withholding of deportation. Rather, respondent contends that that standard was altered by the United States' accession to the Protocol in 1968. Thus, according to respondent, the United States simply ignored its obligations under that treaty during the period 1968-1980. Resp. Br. 19-30.

It is peculiar, to say the least, that during that entire period of time no one noticed this alleged "default" on the part of the United States. In particular, between accession in 1968 and enactment of the Refugee Act in 1980, not one court suggested that the United States had violated its obligations under the Protocol by continuing to apply the pre-existing standard for eligibility for withholding of deportation relief. Indeed, in his briefs in the court of appeals, respondent represented that the pre-1980 standard was "clear probability," the standard respondent now claims was displaced in 1968 by the "well-founded fear" definition of "refugee" contained in the Protocol.[1] Respondent's revisionist view of the effect of accession thus is belied by both the 1968-1980 practice as well as his own position during previous stages of this litigation.

2. Amici suggest that the 1968 legislative history (INS Br. 25-28) reflects only an understanding that

[1] Moreover, prior to passage of the Refugee Act in 1980, respondent never contended that accession to the Protocol alone had altered the standard for eligibility for withholding of deportation.

accession to the Protocol would not require the United States to *admit* greater numbers of refugees as immigrants. Office of the United Nations High Commissioner for Refugees (UNHCR) Br. 5-6; Committee on Migration and Refugee Affairs of the American Council of Voluntary Agencies For Foreign Service and Washington Lawyers' Committee for Civil Rights Under Law (collectively, ACVA) Br. 13. Amicus American Immigration Lawyers Association (AILA) contends (Br. 18) that the Senate assumed only that no statutory revisions would be required by accession, not that the administrative practice necessarily would remain unchanged. See also UNHCR Br. 7-8; ACVA Br. 14-15. A fair reading of the history of the United States' accession to the Protocol refutes both contentions.

a. As we noted in our opening brief (at 26), Office of Refugee and Migration Affairs Acting Deputy Director Laurence A. Dawson's statement to the Senate Foreign Relations Committee contained an unequivocal assurance that accession to the Protocol would not alter the extent of the United States' authority to return or expel aliens already in this country (S. Exec. Rep. 14, 90th Cong., 2d Sess. 6 (1968)):

> [T]he asylum concept is set forth in its prohibition under Article 33 of the Convention against the return of a refugee in any manner whatsoever to a country where his life or freedom would be threatened; and the prohibition under Article 32 against the deportation of a refugee lawfully in a territory of a Contracting State to any country except in cases involving national security or public order. The deportation provisions of the Immigration and Nationality Act, with limited exceptions, are consistent with this concept. The Attorney General will be able to administer such provisions in conformity with the Protocol, without amendment of the Act.

See also INS Br. 26-28.

Ignoring this clear evidence that accession was not intended to alter substantially United States law relat-

ing to deportation, amici focus instead on Dawson's introductory remark (S. Exec. Rep. 14, *supra*, at 6) that "accession does not in any sense commit the Contracting State to enlarge its immigration measures for refugees." But even that isolated comment does not support amici's contention that the assurance given by the Executive Branch was only that the Protocol would not require the United States to admit additional numbers of refugees. The ensuing dialogue makes clear that the Senators and Dawson were using the word "immigration" not in the narrow sense of the initial admission of aliens to this country as permanent residents, but rather to refer generally to all matters concerning our treatment of aliens.[2] Thus, when Senator Sparkman subsequently asked Dawson whether anything in the Protocol "conflicts with our existing *immigration* laws" (S. Exec. Rep. 14, *supra*, at 8; emphasis added), Dawson responded with an analysis of whether Article 32 of the Convention,[3] which governs the expulsion of refugees lawfully within a country, could be reconciled with Section 241 of the Immigration and Nationality Act, 8 U.S.C. 1251, which enumerates the classes of "deportable aliens."

In response to questions specifically concerning the admission of refugees, Acting Deputy Director Dawson also assured the Senate Foreign Relations Committee that "there is nothing in this protocol which implies or puts any pressure on any contracting state to accept additional refugees as immigrants" (S. Exec. Rep. 14, *supra*, at 10). That assurance, however, in no way detracts from the more general theme expressed throughout the accession proceedings that the provisions of the Protocol were not inconsistent with any substantive aspect of existing United States law. See INS Br. 25-28.

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[2] Indeed, even amici, while taking issue with our reliance on Dawson's remarks, use the term "immigration" in its broader sense (ACVA Br. 14 ("current immigration practice")).

[3] United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, *reprinted at* 19 U.S.T. 6259. By acceding to the Protocol, a contracting party agreed to apply Articles 2 through 34 of the Convention. See INS Br. 14.

b. Amici's further contention, that Congress intended only statutory law, not administrative practice, to be unchanged by accession, is equally unfounded. As we explained in our opening brief, the history of accession shows clearly that Congress never intended by that act to alter the substance of our immigration law—whether expressed in statute, regulation or administrative practice—in any significant manner.

Comparing Article 33 of the Convention to Section 243 (h) of the Immigration and Nationality Act (8 U.S.C. (1976 ed.) 1253(h)), the Secretary of State expressly stated (S. Exec. Doc. K, 90th Cong., 2d Sess. VIII (1968); emphasis added) that the former provision could "be implemented within the administrative discretion provided by *existing regulations*." Moreover, in transmitting the Protocol to the Senate for its advice and consent, the President offered the assurance (*id.* at III; emphasis added) that accession "would not impinge adversely upon established *practices* under existing laws in the United States." [4] Finally, as noted above, Acting Deputy Director Dawson advised the Senate Foreign Relations Committee (S. Exec. Rep. 14, *supra*, at 6; emphasis added) that "accession does not *in any sense* commit the Contracting State to enlarge its immigration measures for refugees." It therefore is simply false to suggest that the Senate anticipated that any significant change—either in the statute itself or in administrative practice—would be required by accession to Article 33 of the Convention.

The notion that the Executive Branch assured Congress only that no new legislation would be required to implement the *non-refoulement* provision of the Protocol

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[4] Amici ACVA's assertion (Br. 14 & n.38) that such representations were made only in the context of "laws and policies concerning issues such as employment, religion, free speech, and cultural identity" is not accompanied by any citation of authority and, indeed, is wholly unsupported by the relevant legislative history. See S. Exec. Rep. 14, *supra*, at 4; S. Exec. Doc. K, *supra*, at III, VII.

(Article 33 of the Convention), not that no administrative changes would be necessary, is further belied by the fact that the INS, following accession, in fact made no change in the substantive standard for eligibility for withholding of deportation.[5] The BIA early on held that no such change was necessary (*In re Dunar*, 14 I. & N. Dec. 310 (1973)), and no court ever suggested that the failure to alter the administrative practice violated either our obligations under the Protocol or the assurances given Congress during the 1968 accession proceedings. See INS Br. 28-32.

3. Amicus Lawyers Committee for International Human Rights (Lawyers Committee) contends (Br. 26-32) that, subsequent to accession, members of Congress became concerned that the provisions of the Protocol were not being implemented and that the Refugee Act of 1980 was intended to alter that pre-1980 practice. See also American Civil Liberties Union and International Human Rights Law Group (collectively, ACLU) Br. 22. The intervening (1968-1980) legislative history on which amicus relies (Lawyers Committee Br. 26-32) does not support this assertion.

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[5] As we noted in our opening brief (at 14), in 1974 the Attorney General promulgated regulations setting forth *procedures* by which aliens at our borders or within this country could apply for "asylum." 8 C.F.R. 108 (1975). No substantive standard for eligibility was prescribed by the regulations until 1979, when the regulations were amended to provide that "the applicant for asylum has the burden of satisfying the immigration judge that he would be subject to persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, as claimed." 8 C.F.R. 108.3 (1980). In making this amendment, the Attorney General expressly dismissed any objection "to the apparently differing standards of proof employed by the Service, on the one hand, and specified in the [Protocol], on the other * * * [as] one of semantics." 44 Fed. Reg. 21257 (1979). "[I]n this connection [he] * * * point[ed] out that the United States Senate in hearings and proceedings leading to ratification of the [Protocol] indicated explicitly that they [*sic*] did not intend adoption of the [Protocol] to modify existing immigration law in any respect." *Ibid.*

a. Most notably, the immigration measures that were introduced into Congress during the years following accession would have amended only the entry provisions of the Act, in particular, conditional entry under former Section 203(a)(7), 8 U.S.C. (1976 ed.) 1153(a)(7). But the Protocol restricts contracting states only with respect to the expulsion or return of refugees; nothing in that document obligates the parties to it to admit additional numbers of refugees. Accordingly, the proposed legislation on which amicus relies [6] can hardly be construed as expressing dissatisfaction with the INS's implementation of the Protocol provisions.

Furthermore, the proposals to make eligibility for conditional entry dependent on the Protocol definition of "refugee" reflect an intent only to make such relief available on a nondiscriminatory, worldwide basis, not to alter the substantive standard governing eligibility for relief. Contrary to the assertion that the post-1968 legislation was a response to accession, the history of the bills on which amicus relies clearly indicates that their purpose was to "continu[e] the reform effort initiated in the Immigration Act of 1965" (119 Cong. Rec. 35734 (1973) (remarks of Sen. Kennedy)) "to provide for equal and uniform treatment of all countries" (*id.* at 31360 (remarks of Rep. Eilberg)).[7] The proposed legislation thus was intended to extend worldwide the preference system that had been established for the Eastern Hemisphere in 1965. 121 Cong. Rec. 29946-29947 (1975) (remarks of Sen. Kennedy); 119 Cong.

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[6] S. 3202, 91st Cong., 1st Sess. (1969); S. 2643, 93d Cong., 1st Sess. (1973); H.R. 981, 93d Cong., 1st Sess. (1973); and S. 2405, 94th Cong., 1st Sess. (1975).

[7] See also 121 Cong. Rec. 29946 (1975) (remarks of Sen. Kennedy); 115 Cong. Rec. 36965 (1969) (remarks of Sen. Kennedy).

Rec. 35734 (1973) (remarks of Sen. Kennedy); 115 Cong. Rec. 36965 (1969) (remarks of Sen. Kennedy).[8]

To the same end of eliminating discrimination in the Nation's immigration practices, the proposed legislation would have removed the geographic and ideological restrictions on eligibility for conditional entry under former Section 203(a)(7). As we discussed in our opening brief (at 12), those seeking admission under former Section 203(a)(7) were required to show, inter alia, that they had fled from a Communist or Communist-dominated country or area or from a country in the Middle East. 8 U.S.C. (1976 ed.) 1153(a)(7)(A)(i). The proposed legislation would have made eligibility for such relief dependent on fulfillment of a variant of the Protocol definition of "refugee." The legislative history of each of the bills on which amicus relies makes clear that the sole purpose of this amendment was to broaden "[t]he definition of a refugee * * * from its present European and cold war framework, to include the homeless throughout the world." 115 Cong. Rec. 36966 (1969) (remarks of Sen. Kennedy); 119 Cong. Rec. 35734 (1973) (remarks of Sen. Kennedy).[9] Not once was it

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[8] The 1965 legislation had abolished the national origins system of selecting immigrants and had replaced it with an annual pool of 170,000 visas available for applicants in Eastern Hemisphere countries. These visas were allocated among seven preference categories for relatives of United States citizens, skilled and professional persons and refugees, with a maximum of 20,000 visas going to the applicants in each country. Immigration from the Western Hemisphere was limited to 120,000 annually, with no per-country limit and no preference system. 119 Cong. Rec. 31360 (1973) (remarks of Rep. Eilberg); 115 Cong. Rec. 36965 (1969) (remarks of Sen. Kennedy).

[9] See also 121 Cong. Rec. 29947 (1975) (remarks of Sen. Kennedy); 119 Cong. Rec. 35737 (1973) (remarks of Sen. Kennedy); *id.* at 31363 (remarks of Rep. Holtzman); *id.* at 31360 (remarks

suggested that adoption of the Protocol definition would alter the standard an individual alien must meet in order to be eligible for relief or that such a change was necessary because existing administrative practices did not conform to Protocol standards.

b. The isolated statements made by members of Congress during consideration of the predecessor bills to the Refugee Act of 1980 on which amicus relies (Lawyers Committee Br. 30-32) also do not support its assertion (*id.* at 26) that Congress had become "concerned about the failure to implement the Protocol." Contrary to amicus' representation (*id.* at 30-32), Representative Holtzman in 1977 was not questioning the substantive standard the INS was applying in withholding and asylum proceedings. Rather, her concern was with the procedures by which it was determined whether aliens met that standard. See *Admission of Refugees into the United States: Hearings on H.R. 3056 Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 126-127 (1977).[10]

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of Rep. Eilberg); *Western Hemisphere Immigration: Hearings on H.R. 981 Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 305, 326 (1973).

[10] The excerpt from Representative Holtzman's remarks quoted at page 31 of amicus' brief appears in the following context (*Admission of Refugees Into the United States, supra*, at 126-127 (emphasis added)):

> One of the matters that has concerned me greatly about the admission of refugees and persons who seek asylum is the fact that there really are no specific *procedures* that would assure that due process is granted when such persons are questioned in order determined [*sic*] whether or not they meet *the present statutory standards.* * * *
>
> I wonder if you have any concern that as part of a bill dealing with the problem of refugees we ought to try to insure

Likewise, the dissatisfaction expressed by Representative Eilberg in 1978 had nothing to do with any alleged "failure [by INS] to fulfill the spirit of the Protocol" (Lawyers Committee Br. 32). Rather, Representative Eilberg's impatience related to the manner in which the Attorney General had exercised his discretion under Section 212(d)(5) of the Act, 8 U.S.C. (1976 ed.) 1182(d)(5), to parole aliens into this country temporarily (*Admission of Refugees Into the United States: Hearings Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 95th Cong., 1st & 2d Sess., Pt. II, 15 (1977 & 1978) (emphasis added)):

> For years, we have received assurances, [Attorney General] Bell, from the Justice Department, prior to your coming onboard particularly from INS Chairman Chapman, who we worked with very closely, that criteria, guidelines, and regulations would be promulgated *to cover the conditions of parole*, so we don't go through this agonizing experience every time we do our job.
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> * * * * *

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that due process will be granted by spelling out—but not in an overly detailed manner—the kinds of *procedures* that should be used.

* * * * *

The reason I raise this is because when Congress creates a statutory scheme and does not really specify how that scheme is to be implemented it can be thwarted by the executive branch. I am concerned because although I think the definition in this bill is an excellent one and even though it states what person will be a refugee if he or she has a well-founded fear of persecution, *we don't specify how that well-founded fear is to be ascertained*, or whether a person has a right to be questioned about the presence or absence of that well-founded fear in his or her own language. Don't you agree that *the method by which a determination as to whether or not someone is a refugee is made should be spelled out in some detail?*

> Would you consider the issuance of guidelines and procedures to be followed *in utilizing your parole authority*, at least until our proposed refugee legislation is enacted?

See also INS Br. 15-16.[11]

4. Amici's reliance on post-enactment legislative history is equally unavailing. We note in particular amici ACVA's reference (Br. 23-24 n.64) to Senator Kennedy's expression of approval of the result reached by the Second Circuit in this case. See 129 Cong. Rec. S6940-S6941 (daily ed. May 18, 1983). Senator Kennedy made his remarks, however, in the context of arguing in favor of the inclusion of judicial review provisions in the Immigration Reform and Control bill then under consideration. He thus was not endorsing the legal ruling of the court of appeals that the appropriate standard was something less stringent than "clear probability," but simply approving of the availability of a judicial forum following the BIA's denial of relief. See *id.* at S6940. Because of the ground on which the Second Circuit disposed of this case, that court did not reach the question whether the BIA's decision would have been set aside under the standard we urge here as well.

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[11] The most relevant legislative history is, of course, that of the Refugee Act of 1980 itself. As we showed in our opening brief (at 36-40 & n.37), that history is replete with evidence that Congress's intent in adopting the Protocol definition of "refugee" was to make eligibility for relief under the Act available on a worldwide basis, not to alter the standard an individual alien must meet. Amici's reliance (Lawyers Committee Br. 36-37; American Jewish Committee Br. 5-6) on a remark made during the 1979 hearings on behalf of the governor of the State of Michigan—that the new definition "will facilitate bringing refugees into this country" (*Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 284 (1979))—is in no way to the contrary. Surely a definition that eliminated the requirement that aliens have fled a Communist, Communist-dominated or Middle Eastern country would "facilitate bringing refugees into this country."

Moreover, in light of some of the misstatements of amici, it is worth reiterating that our position in this case is that the Refugee Act of 1980 did not change the standard an alien must meet in order to be eligible for withholding of deportation, *not* that the Act "wrought *no* change in the pre-1980 law" (ACVA Br. 26; emphasis added; footnote omitted). Indeed, we observed in our opening brief (at 15; emphasis added) that "[i]n the Refugee Act of 1980, Congress made *extensive* revisions in the immigration laws in order to establish a permanent systematic procedure for the admission of refugees to the United States and for their resettlement once here." Assistant Secretary of State Abrams' remark in 1983 that " 'the Refugee Act of 1980 radically revised U.S. refugee and asylum law and procedures' " (ACVA Br. 26, quoting *Refugee Assistance: Hearings on H.R. 3195 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 56 (1983)) is entirely consistent with our own observation.

5. In our view, the only inquiry required by this case is whether Congress intended the Refugee Act of 1980 to alter the substantive standard applicable to withholding of deportation relief. Once that question is answered in the negative, the inquiry should be at an end. Amici nevertheless devote the bulk of their presentation to questioning the content of that substantive standard, and particularly the validity of the "singling out" aspect of the standard.[12] Although this issue is not properly before the Court, a brief response is warranted.

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[12] Amici ACVA (Br. 6-9) purport to object to the "singling out" criterion on the ground that it impermissibly limits the type of evidence that will be considered in support of a claim for withholding of deportation or asylum relief. We agree with amici (Br. 3) that the question presented by this case is not "simply one of verbal formulation." See INS Br. 21. We do not agree, however, that the issue concerns the *type* or *amount* of evidence required. Rather, the question is simply what is the correct standard, *i.e.*, what must an applicant prove, by whatever type or amount of evidence, in order to establish eligibility for relief.

Imposition of a requirement that an alien demonstrate, by objective facts, a realistic likelihood that he would be singled out for persecution if returned to his homeland effectuates the purpose underlying both the Protocol and the Refugee Act of 1980. It is an unhappy fact of life that citizens of few other countries enjoy the freedom and opportunity available within the United States. But neither the Protocol nor the Refugee Act was intended to provide refuge for every victim of harsh, or even repressive, government. Rather, those measures were intended to protect individuals who would be persecuted "on account of race, religion, nationality, membership in a particular social group, or political opinion." The "singling out" criterion simply expresses this requirement that an alien be distinct—on the basis of one of the enumerated grounds—from the remainder of the population in his country of nationality, all of whom might be subject to "persecution" in some sense.

This does not mean, as amici suggest, that evidence of persecution of other members of a group to which the applicant belongs is not considered. Evidence of persecution of others in similar circumstances surely is relevant to the question whether the applicant also would be singled out for persecution, and the INS and BIA regularly take such evidence into account. See, *e.g.*, *In re Salim*, Interim Dec. No. 2922 (BIA Sept. 29, 1982) (member of Mujahidin rebels in Afghanistan found to establish requisite probability of persecution); see also INS Br. 23-24 & n.25.[13] The "singling out" test is applied simply to

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[13] Amici challenge the INS standard on the ground that it fails to take account of situations in which "persecutory action * * * is aimed at a group, or is generalized, or is even random" (ACVA Br. 7). At the outset we question whether action that is generalized or random would meet the threshold statutory requirement discussed in the text above, that the applicant's life or freedom would be threatened "on account of race, religion, nationality, membership in a particular social group, or political opinion." In any event, the situations posited by amici have nothing to do with this case. Respondent's request for withholding of deportation is not premised on "a situation where an entire population or a whole social group

exclude those who would seek admission to this country on the basis of generalized, unpleasant conditions in their own homelands. See, *e.g.*, *Martinez-Romero* v. *INS*, 692 F.2d 595, 595-596 (9th Cir. 1982) ("[i]f we were to agree with the [alien's] contention that no person should be returned to El Salvador because of the reported anarchy present there now, it would permit the whole population, if they could enter this country some way, to stay here indefinitely. There must be some special circumstances present before relief can be granted"); *In re Surzycki*, 13 I. & N. Dec. 261, 262 (BIA 1969) (denying withholding of deportation to an alien who "is in no different position than any other Polish person in Poland, and there is nothing * * * to show he would in any way be singled out for persecution as claimed").[14]

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is threatened with extinction, or where it is clear that persecutory measures are applied completely at random" (1 A. Grahl-Madsen, *The Status of Refugees in International Law* § 76, at 175 (1966)). Rather, he claims that he would be persecuted because of his own alleged anti-communist stance and associations. (We noted in the petition (at 7 n.8) that respondent's alternative claim, that if he returned to his home town of Gnjilane he would be killed by the Albanians because he is a Serb, is not cognizable under our immigration laws. "A[n alien] is deported to [a] country, not a city or province" (Pet. App. 31a).) In these circumstances, the Court need not accept the invitation of amici to determine whether the "singling out" criterion would be applicable to every conceivable claim of persecution.

[14] Accordingly, background information concerning general conditions in the receiving country alone usually will not establish eligibility. Nevertheless, the INS and the Board do consider such information relevant to the assessment of the likelihood of persecution of an individual applicant. See, *e.g.*, *In re Exame*, Interim Dec. No. 2920 (BIA Sept. 3, 1982), slip op. 3-5 (asylum applicant entitled to present background information relating to general conditions in receiving country). Amici therefore err in suggesting (ACVA Br. 21-23) that the vitality of the "singling out" criterion is belied by post-Refugee Act proposals that immigration judges take into consideration country reports prepared by the Department of State and receive training in international law and relations.

Amici's objection to the use of the "singling out" standard may arise, in part, from a misunderstanding of the way in which that standard is applied. Respondent asserts (Br. 13) that he could not meet the current INS standard because "he could not produce a bullet with his name on it, or a Yugoslavian police look-out list." See also *id.* at 18, 33, 44 ("[h]e has never been imprisoned in Yugoslavia, so he cannot show a 'clear probability'"). In the same vein, amicus Amnesty International tells the Court (Br. 7) that "[i]f the INS position is accepted, it will continue to be difficult for aliens to obtain relief from deportation unless they can prove by objective evidence that there is a prison cell or a bullet reserved for them in the receiving country." See also Lawyers Committee Br. 4, 8, 12, 15. It is not the government's position, however, that an alien must establish that he *has been* identified and singled out for persecution by the receiving country; an alien need only show a realistic likelihood that he *would be* so singled out if returned. See, *e.g.*, INS Br. 10, 23, 32-33 & n.32. Despite amici's repeated, baseless assertions (AI Br. 32, 41, 60; ACVA Br. 24; AILA Br. 3, 6, 15), an alien need not show a near certainty of persecution.[15]

Amici likewise mischaracterize the INS standard as requiring more than the applicant's own testimony, *i.e.*, as requiring documentary or live corroboration to which a bona fide refugee frequently might not have access. As we pointed out in our opening brief (at 24-25), however, the BIA has long recognized that an alien's "own testimony may be the best—in fact the only—evidence available to her" (*In re Sihasale*, 11 I. & N. Dec. 759,

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[15] Both respondent (Br. 43-44) and amici (AI Br. 8; AILA Br. 9-10) dwell on the facts of respondent's case in an attempt to emphasize the stringency of the INS's standard. As we observed above (page 11, *supra*), however, no court has yet determined whether the denial of respondent's motion to reopen was a correct application of the current standard. That is the issue the court of appeals should address on remand.

762 (BIA 1966). That testimony alone may provide the objective facts demonstrating a realistic likelihood that the applicant would be singled out for persecution if returned.

Respondent and amici also object to the current standard on the ground that it "read[s] the subjective element of 'fear' out entirely" ACVA Br. 10; see also Resp. Br. 33; AI Br. 46-47; UNHCR Br. 25. To be sure, the applicant's subjective fear is not the matter on which immigration judges or officers have focused in assessing a claim for withholding of persecution. In the first place, "[t]he adjective 'well-founded' suggests that it is not the frame of mind of the person concerned which is decisive for his claim to refugeehood, but that this claim should be measured with a more objective yardstick." 1 A. Grahl-Madsen, *The Status of Refugees in International Law* § 76, at 173 (1966). Moreover, the subjective element of fear is virtually implicit in an application for withholding of deportation or asylum relief (*id.* at 174):

> [T]he frame of mind of the individual hardly matters at all. Every person claiming * * * to be a refugee has "fear" ("well-founded" or otherwise) of being persecuted * * *.

In these circumstances, it is not, as amici assert, that we have "read out" of the statute the subjective component. Rather, because the applicant's subjective fear is the more readily satisfied element of the statutory standard, administrative inquiry and focus naturally shift quickly to the objective element.

6. Finally, respondent (Br. 44-45) and amici (AI Br. 61; AILA Br. 21; UNHCR Br. 28; ACVA Br. 15-16) urge the Court to construe the Refugee Act of 1980 as changing the standard for eligibility for withholding of deportation in order to avoid placing the United States in breach of its international obligations.

The rule of statutory construction "that an act of congress ought never to be construed to violate the law of

nations, if any other possible construction remains" (*Murray* v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)) does not advance respondent's position. As we stated at the outset, our submission is that Congress's unambiguous intent in enacting the Refugee Act of 1980 was not to alter the standard for eligibility for withholding of deportation or asylum relief. Effectuation of that congressional intent would not place the United States in breach of its international obligations. Respondent's and amici's argument to the contrary assumes that there is an internationally accepted construction of the word "refugee" more lenient than that applied by the BIA. There is not.

Under general principles of international law, only the parties to a treaty can authoritatively interpret its provisions. See *Draft Convention on the Law of Treaties*, 29 Am. J. Internat'l L. Supp. 654, 973 (1935). Indeed, as we noted in our opening brief (at 33), the UNHCR acknowledges in its *Handbook of Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* 1 (*Handbook*) (Geneva 1979) that "[t]he assessment as to who is a refugee, i.e., the determination of refugee status under the 1951 Convention and the 1967 Protocol, is incumbent upon the Contracting State in whose territory the refugee finds himself at the time he applies for recognition of refugee status." By agreement, parties may entrust that interpretative power to some other state or body. The parties to the United Nations Protocol have agreed that the settlement of "[a]ny dispute between States parties to the present Protocol which relates to its interpretation or application and which cannot be settled by other means shall be referred to the International Court of Justice at the request of any one of the parties to the dispute." United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, Art. IV, 19 U.S.T. 6226. During the more than 15 years in which the Protocol has been in effect, however, no party has invoked the International Court's

jurisdiction with respect to the construction of the word "refugee." In the absence of any ruling by the body charged with the interpretation of the Protocol, it can hardly be said that there is an internationally accepted construction of the word "refugee" contained therein.

Furthermore, notwithstanding respondent's and amici's heavy reliance on the *Handbook*, the UNHCR's function under the Protocol is not an interpretative one. By contrast to the role entrusted to the International Court of Justice, the UNHCR is charged with supervision of the *application* of the provisions of the Protocol. See Art. II, 19 U.S.T. 6226.[16] The UNHCR acknowledged its own limited role in the *Handbook* itself (at 2; emphasis added), which it offered "for the *guidance* of government officials concerned with the determination of refugee status in the various Contracting States." Accordingly, any divergence of our views from those expressed by the UNHCR in this case [17] reflects no violation of our international obligations.

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed and the case remanded to that court for disposition of respondent's petition for review under the standard that has been consistently applied by the Board of Immigration Appeals.

Respectfully submitted.

REX E. LEE
Solicitor General

NOVEMBER 1983

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[16] "Interpretation is the process of determining the meaning of a text; application is the process of determining the consequences which, according to the text, should follow a given situation." 29 Am. J. Internat'l L. Supp. 938.

[17] As we explained in our opening brief (at 34-35), we do not view our construction of the "refugee" definition as necessarily inconsistent with the explanation contained in the *Handbook*.

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